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McKeich v DDUP NZ Limited (Wellington) [2018] NZERA 2102; [2018] NZERA Wellington 102 (8 November 2018)

Last Updated: 14 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON		
		[2018] NZERA Wellington 102 3031032
	BETWEEN	SOPHIE MCKEICH First Applicant
	AND	SHANE HANSON Second Applicant
	AND	DDUP NZ LIMITED Respondent
Member of Authority:	M B Loftus	
Representatives:	Greg Lloyd, counsel for Applicant	
No appearance for Respondent		
Investigation Meeting:	8 November 2018 at Wellington	
Oral determination:	At the investigation	
Written record issued:	8 November 2018	
ORAL DETERMINATION OF THE AUTHORITY		

Employment relationship problem

[1] Both applicants, Sophie McKeich and Shane Hanson, claim to have been unjustifiably dismissed by the respondent, DDUP. Each also say there were shortfalls in respect to their wages with this applying to both their daily earnings and public holidays.

[2] Also contained in the original statement of problem were claims of unjustified disadvantage and an allegation employment agreements were not provided upon engagement. These claims have now been withdrawn and will be considered no further.

[3] DDUP advised, via its statement in reply, that it ... *does not accept their claims* and asserts *Problems were all caused by the applicants*. Appended are a number of documents alleging the applicants have been guilty of numerous infractions against both employees and clients of DDUP, along with suggestions they are guilty of other serious misdemeanours including criminal conduct.

DDUP's non-attendance at the investigation

[4] DDUP was not represented at today's investigation meeting which raised the question of whether or not to proceed. The absence was not surprising given DDUP no longer trades in Wellington and notwithstanding the statement in reply it has, in my view, failed to respond to the claims in good faith.

[5] The content of the statement in reply is sparse and fails to adequately advise DDUP's position. DDUP has also proven less than helpful when it comes to accepting documents, going so far as to engage in some interesting and disruptive tactics concerning the address for service. Participation in the telephone conference was, I suspect, accidental with Yong Liu, DDUP's sole director and shareholder, happening to answer a telephone, the number of which the company had not provided. Indeed it provided no contact details in the statement in reply. DDUP has also tried to mislead the Authority in respect to how it intended addressing the claims. Everything suggests Mr Lloyd was correct when he stated in an e-mail in August that DDUP

...seems reluctant to be involved in this matter.

[6] That said Mr Liu did, during the telephone conference, provide an e-mail address through which he asked all future correspondence be served. It is to that address a copy of the Notice of Investigation Meeting was sent, though another was hand delivered to the address for service as recorded by the Companies Office. The notice includes advice that should the respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.¹ I am satisfied DDUP has been properly served and is, or at least should be, aware of the consequences of non-attendance.

[7] Given DDUP's history in respect to addressing these claims along with its failure to either to give notice of, or an explanation for, its absence I consider it appropriate to continue.

¹ Note 2 to Form 8 of the [Employment Relations Authority Regulations 2000](#)

Background

[8] DDUP owns and operates, or more correctly did own and operate, an accommodation business in central Wellington. The applicants say they were both employed in January 2018 though on different days. Ms McKeich was engaged as the establishments' manager and Mr Hanson to assist with various tasks around the premises. They are a couple and lived on the premises.

[9] Both applicants say they were paid via a mix of direct credit and cash and have documentary evidence to support that. While both say they received pay each week, both claim to have been required to work additional hours for which they were not paid. Both estimate this averaged two hours a day though Ms McKeich suggests her estimate may be understated. A work week for Ms McKeich was six days while Mr Hanson was required to perform work on all seven.

[10] Ms McKeich says that on 9 April she received, by e-mail from Mr Liu, an employment agreement. Its content reflected she was no longer employed as the manager but had been demoted to housekeeper. Mr Hanson also received an employment agreement but its content changed his status from permanent employee to casual.

[11] Ms McKeich says that the next morning she heard from another that Mr Liu had been accusing both her and Mr Hanson of theft and that was the reason for the demotion.

[12] Within an hour she raised the accusations of theft with Yushan Miao, DDUP's operations manager. She says Ms Miao denied such accusations had been made. The discussion then turned to the employment agreements and Ms McKeich accepts she indicted both she and Mr Hanson were considering a challenge in respect to the changes.

[13] Ms McKeich assumes Ms Miao told Mr Liu about this as soon thereafter she received a text from him advising *Since you want to go to court you don't have to work. Wait for court. Your rent is now \$400 a week.*

[14] Ms McKeich says she interpreted the text as a dismissal but in any event her status was clarified later that day when Mr Liu arrived. Ms McKeich says he expressly advised she was no longer employed after which Ms Miao, who was also

present, stated both she and Mr Hanson would soon receive formal confirmation of their dismissals and an explanation of the reasons. That has never occurred and Ms McKeich adds she was verbally abused during the discussion by Mr Liu. The conversation was recorded.

[15] Ms McKeich and Mr Hanson remained on the premises until 20 April but add that in the interim they were subject to various forms of harassment designed to force them from their accommodation.

[16] On 20 April they received a letter from DDUP's General Manager. It levels a range of allegations against Ms McKeich including a claim she assaulted a person who was both an employee of DDUP and resident of the premises. The letter advises that as a result *DDUP NZ LTD has no other option that to deem your employment officially terminated*. Finally the letter serves as notice of eviction for both she and Mr Hanson. It was post-dated 22 April being the day eviction was to take effect.

Discussion

[17] The first issue is whether or not the applicants were dismissed. With respect to Ms McKeich there can be no doubt. If nothing else the letter dated 22 April expressly states Ms McKeich has been dismissed. It does not, however, mention Mr Hanson.

[18] I say *if nothing else* in the above paragraph as notwithstanding the letter I accept the applicants claim both had already been dismissed on 10 April. In support of that conclusion I note:

- a. I had an opportunity to question the applicants and having done so accept their evidence;
- b. The statement in reply does not dispute the claim both applicants were dismissed. It also fails to differentiate between the two other than ask their grievances be heard separately and attributes all alleged failings and wrongdoing to both which implies they were treated similarly;
- c. The pay of both ceased with effect 12 April; and
- d. There is the recording mentioned in [14] above. It is conclusive and clearly records words of dismissal being uttered by Mr Liu.

[19] Here I comment on the application this be the subject of two hearings. I rejected that as aside from DDUP's failure to differentiate between the two in its statement in reply there was such an overlap in the evidence required that to do so would have resulted in an unwarranted waste of time and resource for both the parties and Authority.

[20] Once the fact of dismissal has been established it falls upon the employer to justify its decision as something a fair and reasonable employer could have done in the circumstances.²

[21] DDUP's absence means there is no evidence of justification. All I have is a raft of unsubstantiated allegations the veracity of which the applicants deny. Having had an opportunity to question them I accept those denials but in any event, and as already said, DDUP has failed with respect to the requirement it justify its actions. Both dismissals are unjustified which raises the question of remedies.

[22] Both applicants seek lost wages and \$20,000 as compensation pursuant to s 123(1)(c)(i) of the Act.

[23] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration though there is a discretion to award a greater sum if warranted. That said the Court has long adopted an approach the Act *...makes it plain that the discretion must be exercised in the employee's favour once the conclusion is reached that a loss of remuneration has been sustained as a result of a personal grievance* and *... there must be some good reason for refusing to award the full amount of the loss*.³

[24] The evidence is both applicants remain unemployed though not for want of trying to address the situation. The evidence also shows the loss is wholly attributable to the dismissal and convinces me this is a situation in which I should reimburse the full loss.

[25] There are then the claims for compensation. Both applicants supported their claim with what I consider strong evidence which justifies a significant award. They spoke of the degrading effect of Mr Liu's attempts to evict them; the pressures resulting from the dismissal and in particular the destructive effect it had on family

life and structure. They also spoke of resulting medical issues which resulted from poor living conditions forced by the dismissals along with feelings of inadequacy and depression.

[26] As already said I found the evidence compelling and conclude it justifies a significant award. I award each applicant \$15,000 pursuant to [s 123\(1\)\(c\)\(i\)](#) of the Act.

[27] Turning to the wage claim. Ms McKeich estimates her shortfall to be \$3040.00 in respect to wages owing along with a further \$1200.00 for working public holidays. This includes both an unpaid time half loading and payment for days in lieu which were never granted. Mr Hanson's claim, which comprises the same elements, totals \$4,440.00.

[28] For three reasons I accept both claims. They are:

- a. [Section 132](#) of the Act states that where wage and time records are requested but not produced and that failure impedes attempts to quantify a claim I may accept it. I have such evidence so applying [s 132](#) the claim is accepted;
- b. Notwithstanding (a) above I have heard from the applicants and accept the veracity of their claims; and
- c. At no place in its statement in reply does DDUP deny this allegation. While it comments on the applicant's alleged wrongdoing and the claim it did not provide employment agreements, there is no mention of the wage claim.

[29] Finally there is the issue of costs. Normally the Authority will use a daily tariff when addressing costs. From there adjustment might occur.⁴

[30] The normally applied tariff is currently \$4,500 and while this investigation only took half a day that was because it was truncated as a result of DDUP's absence. It had to be prepared for as if it would be defended and there have been additional

3 [Trotter v Telecom Corp of New Zealand Ltd \[1993\] NZEmpC 152; \[1993\] 2 ERNZ 659](#) (EmpC) at 693

4 [PBO Ltd \(formerly Rush Security Ltd\) v Da Cruz \[2005\] NZEmpC 144; \[2005\] ERNZ 808](#) and [Fagotti v Acme & Co Ltd \[2015\] NZEmpC 135](#)

costs resulting from DDUP's uncooperative response. A day would not be unreasonable.

[31] That said \$4,500 is not far short of the actual billings but that is because Mr Lloyd has made a conscious effort to minimise cost in this instance. Neither he nor his clients should, in my view, be penalised for that approach so the resulting order will be for a days' reimbursement at the normally accepted tariff. The award will be made in Ms McKeich's name.

Conclusion and Orders

[32] For the above reasons I accept both applicants have a personal grievance having been unjustifiably dismissed and both are due unpaid wages.

[33] As a result I make the following orders:

[34] The respondent, DDUP NZ Limited, is to pay the first applicant, Sophie McKeich:

- a. \$28,800.00 (twenty eight thousand, eight hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
- b. A further \$15,000.00 (fifteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to [section 123\(1\)\(c\)\(i\)](#); and
- c. A further \$4,240.00 (four thousand, two hundred and forty dollars) gross being unpaid wages; and
- d. A further \$4,500.00 (four thousand, five hundred dollars) as a contribution toward the costs incurred in

pursuing the claim.

[35] The respondent, DDUP NZ Limited, is to pay the second applicant, Shane Hanson:

- a. \$33,600.00 (thirty three thousand, six hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
- b. A further \$15,000.00 (fifteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to [section 123\(1\)\(c\)\(i\)](#); and
 - c. A further \$4,440.00 (four thousand, four hundred and forty dollars) gross being unpaid wages.

[36] The above payments are to be made no later than 4.00pm on Friday 23 November 2018.

[37] In closing I advise the respondent and its director of two further points. The first is as parts of this determination involve a failure to pay wages due to an employee the director may find himself personally liable should DDUP not rectify its failure.⁵ The second is continuing failure may result in further consequences that could potentially include the imposition of fines, the sequestration of property and/or imprisonment.

M B Loftus

Member of the Employment Relations Authority

⁵ [Sections 142W](#) and [142Y](#) of the [Employment Relations Act 2000](#)

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